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Supreme Court of the United States,

OCTOBER TERM, 1899.

TURRET STEAM SHIPPING COMPANY, LIMITED, Claimant of the Steamship *Barnstable*,

Appellant-Petitioner,

AGAINST

A. G. HALL *et al.*, Owners of the late Schooner *Fortuna*, Libelants; ARTHUR W. NUNAN, Petitioner; HAROLD EMERNAN *et al.*, Administrator, &c., Petitioners; ISAAC B. STEWART, Administrator, Petitioner,

Appellees,

and

AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship *Barnstable*, Respondent,

Appellee.

MOTION.

Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit will be presented to the Supreme Court of the United States on January 8, 1900.

New York, December 29, 1899.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for the Turret Steam Shipping Company, Petitioner.

To Messrs. CARVER & BLODGETT,
Proctors for Libelants; and
Messrs. RUSSELL & RUSSELL,
Proctors for the Boston Fruit Company,
Respondent.

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AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship *Barnstable*, Respondent,

Appellee.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Turrett Steam Shipping Company, Limited, owner and claimant of the steamship *Barnstable*, respectfully shows unto the Court as follows:

I.—These proceedings were begun by the libel of A. G. Hall and others against the petitioner's steamship *Barnstable*,

filed in the District Court of Massachusetts, January 15, 1896, to recover damages for the loss of the schooner *Fortuna* in a collision with the steamship *Barnstable*, which occurred off Highland Light on the 13th of January, 1896.

Intervening petitions to be made co-libelants were filed by Arthur W. Nunan, for himself, and by Harold Emernan *et al.*, and Isaac Stewart, as administrators of certain persons who were drowned in the collision.

II.—Before the time to answer expired, the Turret Steam Shipping Company, Limited, owner of the *Barnstable*, and claimant in the above mentioned proceedings, presented a petition to the Court stating that certain libels had been filed against the *Barnstable* in consequence of the said collision, and that it had been compelled to furnish a stipulation for value in the sum of $24,800, and a stipulation for costs in the sum of $200, and showing to the Court that its steamer *Barnstable* was let out at the time of the collision under a charter of demise, pursuant to which the charterer, the Boston Fruit Company, supplied its own officers and crew, who were navigating the vessel at the time of the collision, without the intervention of any pilot, and alleging that the faults of those in charge of the *Barnstable*, if any there were, which contributed to the collision, were in legal effect the faults of the said charterer, the Boston Fruit Company, and not of the said petitioner, the owner of the steamship.

The petitioner, accordingly, asked for process to bring the Boston Fruit Company into the case as a party respondent under the Fifty-ninth Admiralty Rule, or in analogy with it, and prayed that if fault should be found on the part of those in charge of the *Barnstable*, the said Boston Fruit Company, as between it and the shipowner, should be condemned to pay the damages (*Rec.*, pp. 9, 13).

A copy of the charter-party referred to was annexed to the petition (*Rec.*, pp. 14, 18).

Thereupon, on April 8, 1896, by order of the Judge, a summons was issued to the Boston Fruit Company to appear before

the District Court, on a day stated, to answer the foregoing petition (*Record*, p. 18).

On the 6th of November, 1896, the Boston Fruit Company appeared and filed its answer admitting that it was the charterer of the vessel, and that the charter-party annexed to the petition was a copy of the contract, but denied that it was liable for the acts of negligence, if any, of the master, officers, engineers or crew of the steamship, and alleged that, under the charter-party, the said Boston Fruit Company did not assume liability, or become liable for damage done by collision by the said steamship, which alone, it averred, was liable therefor, in a proceeding *in rem* (*Record*, pp. 25, 26 and 27).

The Boston Fruit Company did not answer the libel of A. G. Hall and others, but did answer the petition of Harold Emernan *et al.*, in which the Boston Fruit Company was joined as a party respondent (*Record*, pp. 18, 19).

III.—By the answers of the Turret Steam Shipping Company to all of the libels, and by the answer of the Boston Fruit Company to the petition of Harold Emernan, issue was raised as to the fault of those in charge of the *Barnstable* in connection with the collision.

Subsequently, however, after the taking of certain testimony in the case, the counsel for the *Barnstable* and the counsel for the Boston Fruit Company both became satisfied that those engaged in the navigation of the steamer were solely to blame for the collision. They accordingly on May 6, 1897, entered into a stipulation regarding the facts, which was duly filed in the cause and a copy of which is as follows:

"In the above entitled cause it is stipulated and agreed by and between the Turret Steam Shipping Company (Limited), claimant and owner of the steamship *Barnstable*, and the Boston Fruit Company, charterers, as follows:

"FIRST.—The collision alleged in the pleadings in the above entitled cause, was caused by the fault and neglect of those in charge of the navigation of the steamship *Barnstable* at the time, and was not caused or contributed to by the engineer of said steamship, nor by those in charge of the navigation of the libelants' schooner *Fortuna;* but this admission is made with-

out prejudice to and without intent to waive any of the contentions of either of the parties hereto, regarding the liability of either as against the other, as set forth in the petition of said Turret Steam Shipping Company (Limited), and the answer of said Boston Fruit Company thereto.

"SECOND.—The master, officers, engineers, firemen and crew of the *Barnstable* at the time of the collision, had been appointed by the Boston Fruit Company, and were paid by it under and pursuant to the charter-party referred to in said petition.

"THIRD.—The said steamship *Barnstable* had been engaged under the charter-party, a copy of which is attached to the said petition, for more than six months before said collision.

"FOURTH.—No complaint was ever made by either party under clause eleven of said charter-party.

"FIFTH.—There was no compulsory pilot on board said steamship at the time of the collision.

"SIXTH.—The collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship.

"SEVENTH.—The master, mate, engineers, firemen and crew appointed as provided in said charter-party, were the only persons at the time in charge of the navigation of the said steamship, and responsible therefor.

"EIGHTH.—It is further agreed (subject to objection that the fact is immaterial, and the evidence incompetent), that the Boston Fruit Company had no insurance upon said steamship, and the petitioner, the then owner, carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured" (*Rec.*, p. 37).

IV.—The cause thereupon proceeded to trial in the District Court upon the admission that the libelants were entitled to recover their damages (which it was agreed by stipulation amounted to the sum of $19,475, as of the date of January 1, 1897) [*Record*, pp. 35 and 36], the only real question remaining in issue being whether the Turret Steam Shipping Company, owner of the *Barnstable*, was entitled to indemnity from the Boston Fruit Company, the charterer, for the damages by reason of their having been caused by the charterer's servants.

V.—The Turret Steam Shipping Company admitted that under the maritime law, the *Barnstable* having been sued *in rem* for damages caused by the collision, was liable as between it and the libelants, notwithstanding that the faults, which rendered her so liable, were those of the persons employed and paid by the Boston Fruit Company, the charterer, who were in the possession and control of the vessel, and were solely engaged in her navigation; but it contended that as the charterer's servants, by their negligence, brought about the result which fixed the liability *in rem* upon the steamship, the decree should contain a provision that as between the Turret Steam Shipping Company and the Boston Fruit Company, the charterers should pay the damages decreed, or if it did not do so, that the Turret Steam Shipping Company should have judgment against the charterer for the amount it might have to pay to the different libelants.

The form of the proposed decree, as suggested by this petitioner, is quoted in the opinion of the District Judge (*Record*, p. 91). This was in accordance with the practice adopted in numerous cases in the District Court (*The Centurion*, 57 Fed. Rep., 412, 415; *Salisbury* vs. 70,000 *feet of lumber*, 68 Fed. Rep., 916; *Young* vs. *Lehman*, 27 Fed. Rep., 383, 385; *The Alert*, 40 Fed. Rep., 836; *Pierce* vs. *Winsor*, 2 Sprague, 35; *In re New York and Porto Rico Steamship Co.*, 155 U. S., 523.

VI.—The grounds on which the Turret Steam Shipping Company contended that the charterer was liable as between it and the vessel for the collision, were that by the charter-party, the bare ship was chartered to the Boston Fruit Company, which engaged, furnished and paid the officers, engineers and all the crew who were on board the vessel at the time of the collision (*Charter-Party*, p. 14, *Clauses* 2 & 3; *Stipulation between the parties*, *Sections* 2, 5, 6 & 7; *Record*, p. 37).

The charterer contended (though it did not so plead) that notwithstanding it employed and paid all of the persons who were engaged in the navigation of the ship at the time of, and who were to blame for the collision, it was nevertheless exempt

from liability for the faults of such servants by reason of clause 22 of the charter-party, which provides "That the owners shall pay for the insurance on the vessel" (*Record*, p. 16).

VII.—The District Court held that the shipowner, the Turret Steam Shipping Company, satisfactorily sustained its contention that the charter-party vested the possession, command and control of the vessel in the Boston Fruit Company and its servants, and that the navigation of the vessel was the charterer's business, and then proceeded to determine whether the relations between the owner and the charterer were such as to impose upon the charterer the obligation to indemnify the owner in case the vessel, as the instrument of damage, should be subjected to a lien through the negligence of those appointed by the charterer to manage her navigation (*Opinion*, p. 91). The District Judge, however, held that under the 22d clause of the charter, which provided "that the owners shall pay for the insurance on the vessel," the Turret Steam Shipping Company assumed the risk, not only of damage to the vessel herself by collision or otherwise, but also undertook to be responsible for damages which the vessel might do *to another ship*, including claims for personal injuries to and loss of life of persons on such other vessel (*Opinion*, pp. 93, 98).

VIII.—The petitioner, the Turret Steam Shipping Company, duly appealed to the Court of Appeals for the First Circuit, where the decision of the District Judge was affirmed in a short opinion delivered by Webb, *J.*, adopting in terms the opinion of the Court below as to the general features of the case and dealing with the single point of the effect of the insurance clause in the charter-party. The Court of Appeals held that by this clause, the ship owners undertook to "insure against losses which would fall upon them, against *all risks* attaching to them," and that if they had not insured against running down risks, and by accident insurances to cover losses caused by the charterer's negli-

gence, it was their misfortune, while if they had done so, the charterers should have the benefit of such insurance (*Record*, p. 104). The final decree was entered pursuant to this opinion (*Record*, p. 105), but the mandate has been stayed pending the presentation and determination of this application for a writ of *certiorari*.

IX.—The petitioner urges that both of the Courts below have erred in the construction they have put upon clause 22 of the charter-party, which provided: "That the owners shall pay for the insurance on the vessel."

It has been decided that this clause amounted to an assumption on the part of the owners of all liability for damage, not only to the vessel herself, during her service under the charter-party, but also for damage which she might do to another vessel, or to the lives, persons or property on board such other vessel, even when caused by the negligence of the charterer's servants. Such a meaning is far wider and more far reaching than the necessary meaning of the words themselves, and, as the petitioner believes, more extensive than is justified by their proper construction.

The case presented is simply who shall pay for a loss to another ship and to third persons on board of it, caused exclusively by the admitted negligence of the charterers' servants? These losses, by a principle of the maritime law, attach as a lien to the offending ship, without regard to the question of whose servants were on board. But as between the owner and the charterer, the owner under ordinary rules would be entitled to indemnity from the charterer for any damage which attached to the ship. If a hired vessel be lost by the fault of the bailee, he must, as a rule, pay for it (*Smith* vs. *Bouker*, 40 Fed. Rep., 839; 49 Fed. Rep., 954; *Davey* vs. *Chamberlain*, 4 Esp., 229). This rule would also undoubtedly require him to pay for damage to the ship, received in a collision due to the fault of his servants, and if the fault of these servants instead of injuring the hired vessel gives rise to a lien upon her for damage to another vessel, the bailee must logically be bound to discharge the lien; for the rule which re-

quires him to return the vessel undamaged must also, it would seem, compel him to return it without any impairment to or lien upon the title. The law implies a contract for such indemnity, though none be expressed (*The Alert*, 40 Fed., 836; *The Centurion*, 57 Fed., 412).

In these circumstances the burden of proof was clearly upon the charterer to satisfy the Court that the insurance clause quoted intended to remove all those ordinary incidents and liabilities of the contract of bailment from the shoulders of the bailee, and place them as a burden upon the bailor. Was this burden of proof satisfactorily sustained?

X.—The petitioner's contentions are:

First, that the insurance clause was not intended to require the owner to *provide* insurance, or to take the risk of damage which might be covered by it, but was designed merely to prevent the shipowner from claiming that the *cost* of insurance should be paid by the charterer under the third clause of the charter-party, which provided that the charterer should pay not only certain stated expenses in connection with the ship and her business, but also "*all other charges whatsoever* excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order."

Second, that, at the utmost, the clause could only require the shipowner to provide an insurance *on the vessel* (*Barnstable*) and would not compel him to insure against such damages as arose in the present case.

Third, that the Courts below have fallen into the error of following the Massachusetts doctrine holding that a policy "*on the vessel*" covers damages which the vessel insured may do to another vessel (*Nelson* vs. *Suffolk Ins. Co.*, 3 Cushing, 477), instead of the rule prevailing in this Court under which such a policy does not include running-down risks, that is, damage which the insured ship may do to other vessels or property (*Insurance Co.* vs. *Sherwood*, 14 How., 351).

It is proposed to invite the attention of the Court in some detail to the leading considerations upon these points, and as the case was affirmed in the Court of Appeals practically on the opinion of the District Judge, reference must be made to his opinion. The attention of the Court is also called to the fact that a large bundle of printed forms of charter-parties, marked Petitioner's Exhibits 1 to 19 inclusive, are certified to the Court separately by the Clerk of the Court of Appeals, and are not included in the printed book.

(**1**.) The history and purpose of the clause relating to insurance.

(**a**.) This clause was not especially introduced into the charter-party of this steamer for the purpose of embodying any previous agreement on the subject of insurance, but, on the contrary, was a part of the printed form upon which the contract was made, which had existed in a different sequence in another kind of time charter for many years (*Bennett*, p. 62, x-Q. 214).

The printed form in use by W. W. Hurlbut & Co., the brokers who negotiated the charter, had been drawn up by the witness Hall, a member of that firm, about 1886 or 1887, and had been used by them ever since. It was based upon a copy of the time-charter form of Lamport & Holt (who for many years operated a line of chartered steamers between New York and ports in South America), and also upon the charters of the steamships *Scythian*, *Pirate* and *Kenelworth*, whose business was apparently in the hands of Hurlbut & Co., but whose charters had evidently been made abroad (*Hall*, p. 78).

The common form of time charter is what is commonly called the government or admiralty form, in which the owner mans and provisions the ship during the period of the charter.

It is evident from a comparison of Hurlbut's form (p. 14) with the government form of time charter (*Petitioner's Exhibit* 1 *in the bundle of charter-parties*), and with all the common forms based upon it (*Petitioner's Exhibits* 2 *to* 20), that Mr. Hall carried into his *net* form many of the provisions of the standard government form which were better adapted to that form than to his own. The insurance clause was one that he took in the same words from the government form, but for some reason not explained, put in a different sequence (*Barber*, p. 83). The shipowner produced to the Court all the standard forms of charter-

party that its counsel could find in New York, and three prominent English forms, all of which with a single exception contain the insurance clause in the same form as in the *Barnstable's* charter. It is in the same words in the government form, where the owner provides the crew, as in the net form, where the charterer provides it. Presumably, therefore, it is introduced for the same purpose in both. That purpose has been explained by a number of competent witnesses, who are practically uncontradicted.

Those acquainted with the business of operating vessels, know that certain usual charges will have to be borne by one or both of the parties to a contract for the hire of a ship under a time charter. Hence, there are found in all such contracts an enumeration of the expected charges to be borne by each, and a general clause providing that one of the parties shall pay all further charges not specified to be paid by the other. The more common form of this division of expenses is as follows:

"(1.) That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; *shall pay for the insurance on the vessel;* also for all engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"(2.) That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages, light and dock dues, dunnage, stevedoring, agencies, commissions, foreign consulages, expenses on the cargo they may put on board, and *all other charges whatsoever*, except those before stated" (*vide Petitioner's Charter Exhibits* 1 *to* 19).

In the charter-party in suit these provisions read:

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew, who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only; his pay not to exceed that paid by the charterers in similar vessels.

"The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear, and donkey boiler.

"22. That the owners shall pay for the insurance on the vessel.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the

ship in proper working order. Such repairs, as far as possible and is usual in such cases, to be done on board by the steamer's staff" (*Rec.*, pp. 14–17).

Moving clause 22 back to its original sequence, the provisions in this charter would follow, substantially, the common scheme of dividing the charges between the charterer and owner, and provide that the charterer "shall pay all other charges whatsoever," &c. It is fair to assume, therefore, that the clause was introduced for the same purpose in both kinds of charters.

The evidence of the witnesses leaves little doubt as to what that purpose was. It is shown that insurance on hulls, in some amount, is a general custom (pp. 69,79); and, of course, there is a charge for it. If it was not provided that such charge should be borne by the owner, the charterer might be called upon to pay it, under the broad stipulation that he is to pay "*all other charges whatsoever*," except those stated to be paid by the owner. This is the explanation of the origin of the clause furnished by a number of very competent and experienced witnesses.

Herbert Barber, a witness of thirty-five years' experience, produced his own form of charter-party (Petitioners Exhibit 7) and he testified as follows:

"Q. 4 (Witness is shown charter-parties, Petitioner's Ex. 7). Is that your form of time charter? A. That is one of our forms of time charter; yes.

Q. 5. I notice in the clause number 1 in that form, a provision that the owners shall pay for the insurance of the vessel.

Q. 6. Is that the usual form that is in all time charters? A. That is the usual clause.

Q. 7. And the form of it? A. Yes.

Q. 8. Do you know Hurlbut & Co.? A. I used to know them.

Q. 9. Look at clause 22 in their form and say whether that is the same clause and in the same form? A. It is the same clause, but not in the same sequence.

Q. 10. Not in the same sequence? A. No.

Q. 11. But the same in words, is it not? A. Yes, same exact words.

Q. 12. How does that clause come to be in time charters? A. You know in most time charters there is a clause about what each shall pay for. The owner shall pay for the provisions, wages, fees of the captain, officers and crew; and then the next clause is the charterer shall provide and pay for all the coals,

port charges, pilotages, commissions, consulate fees, except those pertaining to the captain, officers and crew, *and all other charges whatsoever;* and for that reason, under clause 1, they provide that the insurance of the vessel is to be paid by the owners.

Q. 13. That being a usual charge on all vessels? A. Insurance is a usual charge; yes " (pp. 83, 84).

Ramon G. Cadiz, a witness of twenty-one years' experience, who has charge of the time-chartering department of Funch, Edye & Co. (who the witness Bennett testified were his principal competitors), produced the government form of time charter in use by his firm (p. 75; *Petitioner's Exhibit Charter Party No.* 19). He testified:

"Q. 6. (Paper shown witness.) Is this a copy of the time charter of your firm? A. Yes. That is our regular government form of time charter. (*Paper put in and marked Barnstable Ex.* 19).

Q. 7. I notice in that charter-party a provision in the first numbered paragraph reading, 'The owner shall pay for the insurance of the vessel.' Is that a usual clause in all time charters? A. Yes.

Q. 8. How does that clause come to be there? A. It is one of the clauses introduced for the purpose of establishing that the owner must pay the insurance on the vessel.

Q. 9. What is the occasion for enumerating that as a charge against the owner? A. Well, if it was not there, the charterer might, under paragraph No. 2 be called upon to pay the insurance on the vessel, on the strength of the clause stating that all other charges whatsoever except those before stated are to be for account of the charterers" (p. 76).

Bennett, a witness for the charterer, at one place in his testimony, admits that this was the real purpose of the clause.

"The intention is clearly that if the *owner* insures the vessel *he must pay for* the insurance, not the charterer" (p. 48).

The fact that we find the insurance clause in identical form in the types of time charter, where the shipowner furnishes the crew, materially weakens the arguments upon which the District Judge reached his conclusion as to its import in the *Barnstable's* charter, where the crew was supplied by the charterer. He argued that the risk of a collision through the negligence of the charterer's servants, resulting in damage to a third vessel, would probably be in the contemplation of the parties at the execution of the charter; that they would be likely,

therefore, to contract with reference to it; and that presumptively the insurance provision as contained in clause 22 was designed to cover such a case. But, in the government form of time charter, the *owner's* servants being in command and possession of the ship, the charterer would have no interest in having the owner insure the ship, as any loss or damage which might be caused or occasioned either to the ship herself, or to another, could only be through the fault of the shipowner's servants, and so could not possibly give rise to any claim for indemnity from the charterer. We know, therefore, that in the government form the introduction of the clause must be for some other purpose than that suggested by the District Judge in this case. What other can be suggested, however, except that furnished by the witnesses, that the charge for insurance is specified to be paid by the shipowner in order to prevent a claim that it should be paid by the charterer, under his general undertaking to pay all non-enumerated charges? As the clause was obviously imported into Hurlbut's form from the government form, it is difficult to argue that it has a meaning here which it could not possibly have have had in the form from which it was taken.

(**b**.) The District Judge erred in finding that it was "proved by the charterer, and is not disputed, that the actual *understanding of the owner* at the execution of the contract was that the phrase included insurance against risks of all kinds" (p. 96).

This finding is stated to have been predicated on the testimony of Bennett, the broker who negotiated the charter.

He testified: "I have had a good deal of experience in various insurance claims, so much so that I claim—* * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner, against stranding, collisions and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure" (pp. 96, 44).

This voluntary statement of the witness was not responsive to any question addressed to him (p. 44), and was received by the Court over the objection to all testimony as to conversations prior to the signature of the charter "as immaterial, irrelevant and incompetent, and inadmissible to explain

the writing" (p. 40). These objections were duly taken at the trial, and were noticed by the Court in the opinion (p. 96).

It is to be observed that Bennett does not state anything that the *owner said to him*, upon which a finding can be fairly made as to "the actual understanding of the *owner*," but, on the contrary, merely expressed *his* opinion *to* the owner of the import of the clause. It is not asserted that the owner coincided in this view; so that the evidence, if admissible, really does not prove any understanding except Bennett's.

Bennett's first statement of the conversation is worthy of notice (p. 42):

"Q. Did you have any conversation with Mr. Craggs (the "prior owner) in regard to that clause? A. I did—several.

"Q. Please state the substance of that conversation? (Objection.)

"A. I told him that he would have to insure for his vessel "*the same as the charter-party stated*" (p. 42).

It is apparent from this that the witness did not remember precisely what he had said to Mr. Craggs.

But, whether his statement was of the tenor first stated or of that afterwards testified to, it is inconclusive, (1) because it made no reference to insuring against damage which might be done to other ships; (2) because it does not assume to say that Mr. Craggs coincided in Bennett's view, and therefore did not bind him to any agreement *dehors* the contract, and (3) because it was inadmissible as against the Turret Steam Shipping Company, the purchaser of the vessel and charter-party, who was not proved to have had any notice of the conversation, and therefore, in taking over the charter, was only bound by the obligation imported by the words of the clause in their ordinary sense, or in the sense of some settled trade meaning (*Paige* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dame*, 12 Wend., 142; *Clews* v. *Kerr*, 90 N. Y., 633; *Truax* v. *Slater*, 86 N. Y., 630; *Taylor* v. *Van Tassel*, 86 N. Y., 642).

The fact of the transfer of the ownership of the vessels and of the charter-parties from Messrs. Craggs to the Turret Steam Shipping Company, and the attornment of the Boston Fruit Company to the vendee, are admitted in the respondent's answer to the petition (p. 26).

(c.) No real light is thrown on the purpose of the insurance clause by Clause 17, to which the District Judge alluded.

This, like the insurance clause, was adopted into Hurlbut's form many years ago from the Government form (see Charter Exhibits), under which the owner's servants are in charge of the navigation. In such case, if the vessel lost time from a collision or a stranding, it would be but fair that the hire should be deducted, as the cause of the loss presumptively would be due to faults imputable to the owner.

In a net form like the present, where the *charterers'* servants would be presumptively responsible for the collision, it is anomalous to provide that the loss of time from such cause should be borne by the blameless shipowner. Such a provision in the contract can only be accounted for, reasonably, by the use of a printed form not strictly apt in this particular, in making up the contract. If the parties had drawn it up in writing, or had it drawn up by counsel, it is most improbable that such a provision would have been embodied.

However this may be, the presence of the clause does not help the District Judge's argument, because a loss of hire due to a collision would not be a loss insurable under a policy "on the vessel," even with a running-down clause attached. It could only be covered by a policy *on freight*. The fact, therefore, that under the printed form, the owner was made to assume the risk of loss of time by collision, which could only be covered by a *freight* policy, throws no light on the question whether Clause 22 required him to insure against running down risks for the charterer's benefit.

As both Clause 17 and Clause 22 were imported into this printed form from another kind of charter, neither helps much in the interpretation of the other under the different conditions of a net form of contract.

(**2**.) The "insurance *on the vessel*," for which the owner was to pay, unless extended by a general trade meaning based upon a practical construction by merchants and underwriters, would not include insurance against running-down risks, but only insurance against damage to the vessel insured.

(**a**.) The phrase "insurance *on the vessel*" is a technical expression found in all policies on ships, and has been construed by the Courts.

The ancient form of insurance by Lloyds' policy on a ship was in almost identical words: "Be it known that A. B. * * *

"doth make assurance and cause himself * * * to be "insured * * * *upon the body*, tackle, apparel, ordnance, "munition, artillery, boat and other furniture *of and in the* "*good ship or vessel* called the * * *" (*Gow, Marine Insurance, p.* 29; *Gourlie, p.* 69; *Petitioner's Exhibits* 17, 18). Those exhibits show that at the present day hull insurance is made "*on the vessel.*"

In *General Mutual Insurance Company* v. *Sherwood*, 14 Howard, 351, an effort was made to recover under a policy issued "*upon the brig Emily*" (p. 361), a loss of $8,000 which her owner had been compelled to pay for damage done by the *Emily* to another vessel. It was held that an insurance "upon the brig *Emily*" *did not cover damages which the brig might do to another vessel*, but only damage which came to the *Emily* herself.

The English law is to the same effect.

In "*Tyser on Marine Insurance Losses*" (London, 1894), the rule is stated as follows:

"§ 129.—The only effects of the perils insured against, for which the underwriter *on ship* is liable, are damage or loss of the ship, &c., insured. * * * A mere money loss, not arising from damage to the ship insured, *e. g.*, a payment to be made to another ship for injury done to it in a collision, is not a loss recoverable from the underwriter, in the absence of a collision clause (*De Vaux* v. *Salvador*, 4 Ad. & El., 420)."

In the present case, therefore, under those authorities, an insurance by the owner of the *Barnstable* "on the vessel" in the language of clause 22, would not have indemnified him against the damages adjudged to be paid in this cause to the *Fortuna* and her crew. Unless, therefore, it can be found from the evidence that since 1852, the date of the decision above referred to, "an insurance on the vessel" has come to mean something different and more extended than the import of those words as determined by the Supreme Court, the Court below clearly erred in holding that the owner's undertaking to pay for the insurance "on the vessel" absolved the charterer from his common law liability to discharge the lien on the *Barnstable* for damages to another vessel and her crew, which would not be covered by insurance on the *Barnstable*.

Upon this point both of the Courts below appear to have followed the Massachusetts rule under which an insurance "on

the vessel" covers damage not only to the vessel insured, but which that vessel causes to another by collision (*Nelson* v. *Suffolk Ins. Co.*, 3 *Cushing*, 477). Though the Courts sat in the State of Massachusetts, they were nevertheless Federal Courts, bound to follow the decision of this Court in *General Mutual Ins. Co.* v. *Sherwood*, *supra*, and erred in failing to do so.

(**b**.) The finding that the shipowner, by custom or inference, was compelled under clause 22 to pay for something more than that which would be included under an ordinary policy "on the vessel" is in conflict with clause 3 of the charter-party, which provides that "*the charterer shall* * * * *pay* * * * *all other charges whatsoever*," except those provided to be paid by the owner.

It was testified by an eminent expert, and not disputed, that the "running-down clause," as it is sometimes called, is not a part of an ordinary policy, either English or American (p. 73). It is generally on a printed slip or rider which is attached to the policy, although sometimes it is issued as a separate policy. So, if an owner wanted insurance, without a collision clause, he would get one policy; if he wanted a collision clause, he would get another, and if he wanted both, he would get two (p. 74). Pressed upon cross-examination as to the extra cost of a running-down clause, or a separate running-down policy, the witness testified that it would add a quarter or a fifth to the ordinary premium (p. 75).

Now under *Insurance Co.* vs. *Sherwood*, *supra*, it is clear that an insurance on the vessel would only afford indemnity for the damage to the vessel itself. The *cost* of that much insurance the owner undertook to pay. He did not expressly undertake to pay any more. His obligation to pay more cannot justly be founded upon any inference or custom, in view of the provision in clause 3, that all other charges whatsoever, except those specifically provided to be paid by the shipowner, must be paid by the charterer itself. The extra cost of a running-down clause is another *charge*. It is, therefore, a charge to be paid by the charterer, and to adopt the reasoning of the District Judge *pro tanto*, if it has not paid that charge, and thus reduced the risk to the cost of the premium, it assumed it itself and should be held to indemnify the owner against it.

(3.) The preponderance of the evidence is overwhelming to the effect (1) that the words "insurance on the vessel" have no trade meaning different or more extended than their ordinary sense, as judicially defined, and (2) that there has been no practical construction of the clause so far as known by merchants and underwriters, under which the charterers are entitled to the benefit of insurance taken out by the owner.

In *Insurance Company* v. *Sherwood*, 14 How., 351 (at p. 362), Mr. Justice Curtis said:

"In examining for the first time any question under a policy of insurance it is necessary to ascertain whether the contract has received *a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world.* Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule."

(a.) The evidence of Bennett was introduced by the charterer for the purpose of establishing such a practical construction, to the effect that clause 22 imposed an *obligation* on the owner to insure against running down risks.

His testimony, however, is extremely unsatisfactory. He first intimated that he had inserted the insurance clause in this particular charter-party as a special provision (p. 41); but, after being shown the printed forms of all the other leading ship brokers in New York, he finally admitted that no change had been made in it in adapting it into the form used by his firm (p. 62), which was shown by his partner, Hall, to have been drawn up and in use before Bennett joined the firm (pp. 78, 39). Asked by his counsel what was included in insurance "on the vessel," Bennett said: "Insurance *on the vessel* against stranding, collisions, &c., as usual" (p. 41); but does not intimate that it would include damage done *to another* vessel. He further says that he told a *former* owner of the *Barnstable* at the execution of the charter-party that "he would have to insure for his vessel *the same as the charter-party stated*" (p. 42). The same thing was repeated later in his testimony (x-Q. 64, p. 44), with a little more elaboration, but still without any suggestion that the owner would need to insure

against damages done to *another* vessel. He first claimed to have had experience in settling losses under these policies (p. 45), but they seem to have been cases where the vessel *insured* had been damaged, and he finally admitted that the question had never come before him, as a practical matter, until this case arose (x-Qs. 86, 87; pp. 46, 47).

Mr. Hall, who for many years and until after this accident was his partner, and had been a partner in the firm before Bennett joined it, also testified that the adjustment of liabilities between owners and charterers on net forms, such as this, had never come up for practical determination before the firm of W. W. Hurlbut & Co., during the time that he was with it (p. 78).

It is believed that Bennett's evidence is wholly insufficient to show such a practical construction of this insurance clause, "by merchants and underwriters and by the general consent of the mercantile world" as would be required to give it a more extended construction than that put upon it in *Ins. Co.* v. *Sherwood* (*supra*), and have it include an obligation by the owner to insure against running-down losses for the charterer's benefit.

But there is other evidence on the same subject showing that Bennett's opinion of the meaning of the clause is entirely individual, and not supported by any usuage or opinion of the general mercantile world.

Hall, a witness of twenty-five years' experience, testified (p. 78):

"Q. 16. Referring to clause 22, that the owners shall pay for the insurance on the vessel, has that clause any commercial or trade significance differing in any way from the ordinary meaning of the words? A. No.

Q. 18. Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all."

Herbert Barber, a witness of thirty-five years' experience, testified (p. 84):

"Q. 14. Is there any trade meaning or interpretation of that clause differing in any way from the ordinary meaning of the words? A. Not that I am aware of.

Q. 16. In the form in which you have it [the insurance clause], "does the charterer by any common usage get any benefit of the owner's insurance? A. No, I don't think so. No.

Q. 20. And so far as your experience goes, there is no trade meaning or interpretation of the ordinary clause that the owner shall pay for the insurance of the vessel differing in any way from the plain meaning of the words? A. Not that I am aware of."

Ramon G. Cadiz, a witness of twenty years' experience, testified (p. 76):

"Q. 15. Is there any customary or trade meaning to those words, 'the owner shall pay for the insurance on the vessel,' which differs in any way from the ordinary meaning of the words? A. None whatever. Just the literal sense in which the expression is made use of there."

The evidence of Mr. Gourlie, to which the District Judge alluded, was far from showing any definite trade meaning of the phrase differing from its adjudged legal meaning. The material part of his testimony on the subject is short, and may for convenience be quoted (p. 70):

"x-Q. 21. So that when you speak of a policy of insurance on a vessel you would understand that to cover at least three-quarters of the running down? A. Well, no, answering that question. I don't think that I would. * * *

x-Q. 26. Where a charter-party provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance? A. No."

Page 71: "x-Q. 30. Where the charter provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance A. No.

x-Q. 31. What would not be included? A. I do not think that the four-quarters collision would be included in it.

x-Q. 32. That is, under that clause in the charter-party, in your opinion, the shipowner would insure against the loss of the vessel, and the charterer would insure against her running down? A. No; I didn't mean that, either.

x-Q. 33. Will you explain, then? A. Under that clause I should not expect that the owner of the vessel would insure against everything. For instance, I should not expect to find that he would insure against more than three-quarters collision.

x-Q. 34. You would expect him to insure to the extent of three-quarters? A. Yes; that is my *feeling* on the subject."

Page 74: "x-Q. 53. In the case of an English vessel, if I understand you, taking out insurance, you would expect that insurance to cover three-quarters of the running down? A. I would, if I was told that they were seeking full insurance.

x-Q. 54. Full insurance would imply, of course, insurance

against running down as well as insurance against other loss? A. Full insurance would imply insuring three-quarters running down as well as other loss.

x-Q. 55. Simple insurance would imply that? A. No. *It would prompt an inquiry*, I think. If you ask me to procure insurance on your hull, and you told me the amount and her name, and her tonnage, and her voyages, and her valuation and all that, *I would have to ask you the question, 'Do you want the running down included?'*"

On this state of the evidence it clearly cannot be said that the contract has received "a practical construction by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world," under which the phrase "insurance on the vessel" can be said to include anything more than it was held to include in the case of the *Insurance Company* vs. *Sherwood*, namely, insurance against damage to the *Barnstable* herself.

(**b**.) Insurance against running-down risks is not properly described as an insurance "*on the vessel.*" It is generally a "rider," though sometimes a separate policy, but, in either case, is not expressed as an insurance "on the vessel." Mr. Gourlie gave the substance of the form of it in his evidence (p. 72).

It is set out in full in *McArthur on Marine Insurance* (2d Ed.), p. 372, as follows:

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three fourth parts of the costs thereby incurred, or paid; *provided* also, that *this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury* to individuals for any cause whatsoever."

This is no more properly to be described as an "insurance on the vessel" than would be an employer's liability policy, taken

out against liability for personal injuries to those on board the vessel, which it is seen, is expressly excluded from the indemnity provided by the running-down clause.

(c.) The Court should not have been astute to find a meaning in the insurance clause which would oblige the owner to insure against the misconduct or neglect of the servants of the charterer.

It was open to the charterer to insure against those risks. If it has not done so, we must assume it intended to bear them, unless it can point to some clear provision in the charter by which those risks were devolved upon the owner. The burden of proof to show a devolution of the risk must rest with the charterer. A finding that the risk had been shifted should not be made except upon very clear proof. The law regards with disfavor a stipulation that one party shall insure against another's misconduct and give that other the benefit of the insurance (The *Hadji*, 22 Blatchf., 235, 238).

(d.) The evidence did not warrant the conclusion reached by the Court that the charterer was entitled to the benefit of the shipowner's insurance.

It is to be borne in mind that both the shipowner and the charterer had insurable interests. The shipowner had his own investment at stake, which was liable to be lost by perils for which neither party to the contract would be liable, *e. g.*, perils of the sea. He might also wish to insure the solvency of the charterer, in case the latter by its faults imposed liens on the ship which it could not discharge. Because the law attaches a primary liability to the ship for a collision loss to another ship, the owner also had an insurable interest in that risk, which would not be affected by the fact that the charterer had an insurable interest in it. The owner's insurable interest in such risk would not be taken away by the fact that he had a right of indemnity against the charterer; for a charterer might prove to be insolvent. The mere fact, therefore, that the Turret Steamshipping Company "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured," as is stated in the stipulation (subject to the objections reserved, and which were renewed and pressed in both courts),

does not tend in any way to establish a practical construction by the parties of the meaning of clause 22. Much less does it tend to show a mutual intention that the charterer should have the benefit of the insurance effected by the shipowner. The Court nevertheless, went not only to the length of holding that the charterer should have the benefit of all of the shipowner's insurance, but penalised it in the sum for which it was uninsured, and also for the personal injury risks which were not insurable under an ordinary policy, even with a running-down clause attached (*Gourlie*, p. 72; Q. 40), but could only be insured under an accident policy.

The District Judge seems to have regarded the shipowner and the charterer as engaged in a joint enterprise. For example (p. 95). he says: "The phrase seems broad enough to include insurance of every kind that in the expectation of the parties properly appertained to their *joint enterprise*" (p. 94). "In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises and of treating the insurance, first, as relating to the vessel and *to the joint enterprise of owner and charterer*," &c.

The District Judge certainly misconstrued the petitioner's argument and brief, if he understood it was ever suggested that the parties were engaged in a joint enterprise. It was not so stated in the brief.

In point of fact there was nothing *joint* about the enterprise, any more than there would be a joint enterprise between landlord and tenant, under a lease which provided that the landlord should pay certain expenses in respect of the premises, and the tenant should pay others.

The enterprise of the shipowner was limited strictly to furnishing the ship and keeping it in order for use, and thus earning a monthly rent for its service. It was of no interest to him whether the charterer actually made any use of the vessel or not. The use of the vessel in its business of importing fruit was the enterprise of the charterer exclusively.

The assumption that the parties were engaged in a joint enterprise really lies at the base of much of the Judge's opinion. For example, he argues that because the charter-party specified certain charges to be borne by the charterer, and certain by the shipowner, that "it must follow that both should share in all benefits accuring from the payment of fixed charges upon the vessel" (p. 95).

Surely this cannot be law. If it is, then the shipowner ought to share in the profits which accrued from the importation of the charterer's fruit. He obtained no benefit from the mere navigation of the shlp, as the hire was payable whether the ship was navigated or not. He therefore gained no benefit from the payment by the charterer of the charges it assumed, all of which were incidental to the use of the ship as an instrument of commerce with which he had no concern, unless he is still entitled under the mutual benefit theory to some of the fruit profits.

It is impossible to spell out of the words used, any mutual intention that the charterer should have the benefit of the insurance obtained and paid for by the owner. There is nothing in the charter-party which implies it, and the evidence of the witnesses is conclusive to the effect that there is no custom under which the charterer should have it.

Hall testified:

(P. 78, Q. 18.) "Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all.

(P. 79.) "Q. 26. Is there a well known clause in charter-parties to meet the case of an owner insuring for the benefit of a charterer if the charterer desires or requires it? A. I have seen such clauses.

"Q. 32. Have you chartered any vessels on different forms in which the insurance clause was different? I mean to ask you about the Pirate and the Kenilworth? A. Those are the only two boats that I remember.

"Q. 33. How about the insurance clause there, if you remember? A. The printing of it?

"Q. 34. No, the way it was. A. If I remember rightly, it specially stipulated that the boats were to be kept insured, and that any damage done to the vessel over one hundred and twenty pounds, which was not covered by the policy; but any damage over one hundred and twenty pounds recovered under the insurance policy, the charterers were to have the benefit of the insurance.

"Q. 35. And how about the one hundred and twenty pounds? A. If the damage did not amount to that, then the charterers had to pay for the damage."

The witness further testified (Q. 40) that he was acquainted with Mr. Strick of the firm of Frank C. Strick & Company, of London, Swansea, Cardiff and Newport, England, and had seen similar clauses to that embodied in their form (*Petitioner's*

Charter, Exibit 15). That clause quoted in the opinion of the Court (p. 96) reads:

"The owners * * * shall pay for insurance on the vessel *against all risks*, including protection and indemnity, and freight and demurrage club protection, *giving charterers full benefit of the same*, as if they were for the time being owners of the ship."

Herbert Barber (p. 84, Q. 16) also testified:

"In the form in which you have it (clause in his form of charter was in the same words as the clause here in question), does the charterer, by any common usage, get any benefit of the owner's insurance? A. No, I don't think so.

"Q. 17. Now, if the charterer desires the benefit of the owner's insurance, is there a provision for that made? A. In some charters it is made."

(P. 85.) x-Q-21. "That is, if I understand you, Mr. Barber, where the owner agrees to pay for the insurance he has the benefit of the insurance? A. That is so; yes.

"x-Q. 22. And if the charterer is to have any interest in that insurance it must be so provided expressly? A. That is my understanding of it; yes."

Bennett testified:

"I have never seen a charter pass through our office or any other office in which a charterer insured the vessel *or got any benefits from insuring the vessel whether made by the owners or anybody else*" (p. 48).

Notwithstanding this evidence, the District Judge found, as we understand it (p. 96), that clause 22 of this charter-party, which provides "that the owner shall pay for the insurance on the vessel," was as broad, included the same subjects, and gave the charterer the same benefits as the clause in Strick & Company's charter above quoted.

This finding, if we are right in taking it as such, seems to be indefensible. Clearly an insurance "on the vessel" is not the same thing as an insurance on the vessel against "*all risks* including protection and indemnity and freight and demurrage club protection." "Protection and Indemnity, Freight and Demurrage Club risks," for example, are not insurance in any proper sense.

In the *Titania*, 19 Fed., 101, where the bill of lading provided that the shipowner should "not be liable for any damage to goods capable of being covered by insurance," it was held (p.

104) that the clause "cannot reasonably be construed as intended to mean any possible insurance and upon any possible insurance. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies."

There is absolutely nothing in clause 22 which is equivalent of the express provisions in Strick's charter which gives "charterer's full benefit of same as if they were for the time being owners of the ship."

It is too great a stretch upon language to hold that it gave the charterer the same rights it would have had under the quoted clause in Strick's charter. The Court should have found that neither the words of the clause, nor the evidence in the case, implied that the Fruit Company should have the benefit of the owner's insurance.

If such a result was desired the charterer should have caused to be inserted the usual clause adopted to achieve it. Commou carriers often stipulate that in case of claims for damage they shall have the benefit of the shipper's insurance on goods; but in such cases the intention is made clear, as, for example: "The carriers [if] liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods" (*Phœnix Ins. Co.* v. *Erie, &c.*, 117 U. S., 312; The *Hadji*, 20 Fed., 875; 22 Blatch., 235; *Rintoul* v. *N. Y. Central Ry.*, 21 Blatchf., 439; The *Sidney*, 23 Fed., 88).

(**4.**) If the insurance by the owner of running-down risks be required by some extension of clause 22, by custom, nevertheless the usual insurance against them is only three-quarters of the risk, exclusive of personal injuries and death claims; so that, in any case, indemnity should have been decreed for the one-quarter collision uninsured and the whole of the death and injuries claims.

The one-quarter collision usually remaining uninsured would amount, in this case, to about $3,643.75, and the personal injuries claims, uninsurable, under an ordinary policy, to $4,900, on both of which interest runs from January 1, 1897, at six per cent. (pp. 35, 36). For these amounts indemnity should have been awarded even on the findings of the District Court.

(**a.**) The only evidence in the case as to the custom of insuring under the running-down clause, is that of Mr. Gourlie, whose

testimony is explicit that the customary insurance of that risk is only three-quarters (pp. 70, 71, 74, Q. 54).

He says that in the usual English form the words "three-quarters" are printed in, and that in the occasional case where four-quarters are insured the words "three-quarters" are erased with pen and ink. "They do not have any printed clause with those words omitted; showing that the usage is three-quarters rather than the whole" (p. 73). It will be seen that the form of this clause, as set out in *McArthur on Insurance* (2nd Ed., p. 372; quoted *ante* at p. 53), reads: "We will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured."

If, therefore, the Court below was influenced by any evidence as to the custom of insuring against running down, it should have limited the obligation imposed upon the owner, under it, to the three-quarters of the collision damage, which is the customary amount of such insurance; and indemnity should have been awarded for the other quarter and for the loss of life and personal injury claims.

The Court held, however, that evidence of custom to insure only three-fourths was not material as indicating the intention of the parties. This would clearly seem to be erroneous. The intention of the parties must be derived from their contract, taking the words either in their ordinary sense, or in some customary trade meaning evidenced by a practical construction given to them by the general mercantile world. The Court received Bennett's opinion that the clause called for insurance against collision; it should, therefore, have accepted the evidence of the *usual* limitation of the amount of such insurance,—a matter certainly not clearly specified in the clause.

(**b**.) Mr. Gourlie further testified that the running-down clause contains "a provision that this policy *does not include loss of life, or personal injuries*, or obligations to pay for the removal of wrecks, or statutory powers, and things of that sort" (p. 72, Q. 40).

The more formal wording of the clause, as stated by *McArthur* (p. 372) is: "Provided also that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of *loss of life*, or *personal injury* to individuals, for any cause whatsoever."

The Court below says the whole loss was insurable. No doubt the additional one-fourth collision would be insurable for an extra premium, but the evidence shows that *customarily it is not insured* (*Gourlie, p.* 73). There is no evidence in the case, however, that claims for personal injuries, received by persons on the vessel run down, are insurable under the usual or any other form of policy. The Court may, perhaps, take notice that such claims are only covered by Accident Insurance or in Mutual Protection and Indemnity Associations, where the shipowner himself, as a member, bears a part of the loss.

In the *Titania* (19 Fed., 101, 104), Brown, *J.*, held that an indemnity obtained by entering vessels in such associations did not constiute *insurance*, within a provision of a bill of lading that the shipowner should "not be liable for any damage to goods capable of being covered by insurance." Under that authority, it is clear that the ship would not have been bound to arrange for indemnity against personal injury claims, even under the extended construction of clause 22 adopted by the learned District Judge.

In conclusion, the errors complained of are: (1) in holding that the insurance clause imposed an *obligation* on the owner to *provide* insurance, the benefit of which should go to the charterer; (2) in holding that the owner was bound to *provide* insurance against *all* damage the vessel might cause to *other ships*, and persons or property on board of them; (3) in holding that the clause, even on the construction that it included running-down risks, meant to require more than the *customary* amount (¾ths) of such risks; and (4) in holding that it called for unusual insurances (*a*) against the fourth-quarter collision, and (*b*) against claims for loss of life and personal injury.

XI.—The petitioner avers that questions of gravity and importance are involved in the cause sufficient to justify the exercise of the jurisdiction vested in this Court to issue writs of *certiorari* requiring causes to be brought here for review from the Circuit Court of Appeals.

It is believed that the question whether the charterer of a demised vessel is bound to indemnify the shipowner against collision or other liens attaching to the vessel during the time of

the charter, has never been presented to this Court for its consideration. It arises here in a case involving a substantial sum, and under such circumstances that *if the Court refuses this application, the shipowner will be deprived of all right to ask such indemnity through a separate action.* All parties were before the District Court and the Court of Appeals, which had jurisdiction of them and of the subject matter of the litigation, and the decision reached, if not interfered with by this Court, will constitute a conclusive adjudication of the rights of this petitioner as against the Boston Fruit Company, and will be a bar to any further action between the parties on this point.

The petitioner, with all respect, urges this consideration very strenuously upon the attention of the Court.

No prejudice can result to any of the parties in interest by reason of the allowance of the writ, as it is provided by stipulation that interest runs on the damage at six per cent. (*Record, p.* 36), and it is understood that the libelants and intervening libelants make no objection to this application. No judgment has been entered against the Boston Fruit Company, so that it can suffer no prejudice except such as might arise from a reversal of the decree in this court, which is the direct object sought by this application.

XII.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the judiciary act approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the First Circuit to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.,

TURRET STEAM SHIPPING COMPANY, LIMITED, *Petitioner,*
By CONVERS & KIRLIN, its Proctors.

STATE OF NEW YORK, }
County of New York, } ss.:

E. B. CONVERS, being duly sworn, makes oath: That he is one of the proctors for the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief; that the reason why this petition is not verified by the petitioner is that the petitioner is a foreign corporation, organized and existing under English law, and has no officer or agent in this country; that this petition is made and presented by due authority, and that the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Sworn to and subscribed before me, }
this 30th day of December, 1899. }

JAMES T. KILBRETH,
Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded, and that the case is one in which the prayer of the petitioner should be granted.

J. PARKER KIRLIN,
Of Counsel.